Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1979

No. 79-11..0

JOHN N. MITCHELL, et al.,

Petitioners,

vs.

KEITH FORSYTH,

Respondent.

JOHN N. MITCHELL,

Petitioner,

vs.

KATHERINE W. BURKHART, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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In The

Supreme Court of the United States

October Term, 1979

No. 79-1120

JOHN N. MITCHELL, et al.,

Petitioners,

vs.

KEITH FORSYTH,

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JOHN N. MITCHELL,

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vs.

KATHERINE W. BURKHART, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Third Circuit's opinion in this case.

STATEMENT

Respondents accept petitioners' Statement of the Case with one significant exception. Petitioners assert that the surveillances in question were based on legitimate national security considerations. As noted below, however, neither the district courts nor the court of appeals decided this issue; to the contrary, the district courts denied petitioners' summary judgment motions because of the disputed nature of the surveillances. As the district court in *Burkhart* stated: ". . . there is a genuine dispute as to the existence of a national security predicate for the authorization of these particular wiretaps." (App. E, 80a-81a). Accordingly, it should be understood that the facts surrounding this critical issue (upon which the petition for certiorari is in large part predicated) are clearly in dispute.

REASONS FOR DENYING THE WRIT

Petitioners claim that this case "presents important and unsettled questions concerning the immunity of the Attorney General and of law enforcement officers who act at his direction." (Pet. 11). To the contrary, however, as the discussion below will demonstrate, the issues presented in this case were decided (adversely to petitioners) by this Court in *Butz v. Economou,* 438 U.S. 478 (1978) where it was held that, absent exceptional circumstances, heads of federal executive departments are entitled only to a defense of qualified immunity in suits charging them with violations of constitutional rights.[1]

Moreover, there is a substantial question as to whether the wiretaps in this case were predicated on national security

1. In contrast to *Kissinger v. Halperin,* No. 79-880, this case involves no question of presidential immunity. Therefore, petitioners' reference to the petition for certiorari in that matter does not help to clarify why review should be granted. Moreover, there is no support in the record in this case for the argument that petitioners were acting any more or less at the President's direction and discretion than any other cabinet member, so as to distinguish this case from *Butz v. Economou, supra.*

grounds, or as respondents have claimed throughout, were impermissibly politically inspired actions bearing no relationship to legitimate national security considerations. Both district courts ruled that an issue of fact exists on this issue (App. D, 64a-65a; App. E, 80a-81a). Of course, if these are eventually found not to have been valid national security taps, the issue presented for review simply does not exist in this case.

However, even assuming that national security purposes may have been the reason for the surveillances, petitioners are not entitled to absolute immunity.

Several facets of this Court's opinion in *Butz v. Economou, supra,* are significant. First, *Economou* ruled that as a general matter federal officials are not absolutely immune from suits charging violations of constitutional rights. *Id.* at 480. In so ruling, this Court distinguished *Barr v. Mateo,* 360 U.S. 564 (1959), which had granted a federal agency director absolute immunity from a defamation suit on the grounds, *inter alia,* that *Barr* did not involve the issue, presented both in *Economou* and in the instant matter, of whether the acts complained of violated constitutional or federal statutory provisions. Where an official acts contrary to "limitations on their authority imposed by law," *Economou* at 494, a different issue is posed.

This Court then turned to the development of an analogous branch of immunity law — immunity for state executive officials in suits brought pursuant to 42 U.S.C. §1983. In reviewing the recent precedents in this area, the Court concluded that "in the absence of congressional direction to the contrary, there is *no* basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement . . . than is accorded state officials when sued for the identical violation under §1983." *Id.* at 500 (emphasis added).

This Court has ruled that state executive officials are entitled only to qualified immunity. These include police

officers, *Pierson v. Ray*, 386 U.S. 547 (1967); school administrators, *Wood v. Strickland*, 420 U.S. 308 (1975); superintendents of state hospitals, *O'Connor v. Donaldson*, 422 U.S. 563 (1975); prison administrators, *Procunier v. Navarette*, 98 S. Ct. 855 (1978); and governors or chief executive officers, *Scheuer v. Rhodes*, 416 U.S. 232 (1974). None of these cases "furnishes any support for the submission of the United States that federal officials are absolutely immune from liability for their constitutional transgressions." *Economou, supra*, at 498.

Most important for present purposes was the express rationale of the Court in deciding to apply without deviation its decisions in the §1983 immunity cases to federal executive officials:

> "The constitutional injuries made actionable by §1983 are of no greater magnitude than those for which federal officials may be responsible. The pressures and uncertainties facing decision-makers in state government are little if at all different from those affecting federal officials. We see no sense in holding a state governor liable but immunizing the head of a federal department; in holding the administrator of a federal hospital immune where the superintendent of a state hospital would be liable; in protecting the warden of a federal prison where the warden of a state prison would be vulnerable; or in distinguishing between state and federal police participating in the same investigation. Surely, *federal* officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do *state* officers." *Id.* at 500-501.

This Court has also determined that extension of absolute immunity to federal officials "would seriously erode the protection provided by basic constitutional guarantees." *Economou* at 505. In a direct answer to the claim of petitioners

in this case that the exercise of the important discretionary power of the Attorney General would be seriously impaired by subjecting him to suits, the Court stated:

> "It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority. Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale. In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees.
>
> Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:
>
> 'No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government from the highest to the lowest are creatures of the law, and are bound to obey it.'" *Id.* at 505-506.

In *Scheuer v. Rhodes, supra,* this Court recognized that state executive officers must often act swiftly and on the basis of factual information supplied by others, constraints which become even more acute in the "atmosphere of confusion, ambiguity and swiftly moving events" created by a civil disturbance. *Scheuer* at 246-47. Even in that kind of situation, the same factors supposedly at issue here — interpretation of

legal authority and the exercise of discretionary functions central to the officials' duties — the Court unanimously declined to provide absolute immunity to high executive officials.[2]

The petition for writ of certiorari incorrectly assumes that this case involves a "national security" surveillance. As discussed above, no such conclusion is justified on this record. Furthermore, petitioners' attempt to distinguish the controlling cases in this area, *Butz v. Economou, supra,* must be rejected.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

s/ David Rudovsky

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and
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LIBERTIES COMMITTEE
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2. The decision-making at issue in *Scheuer* was, if anything, more likely to be entitled to absolute protection under the standards suggested by petitioners. For not only did *Scheuer* involve the highest official in the state government, but the incident involved was clearly fraught with difficult factual/legal issues, requiring decisions to be made without time for review and analysis.